

2010 WL 1985023 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts.

Catherine BARBER, Plaintiff-Appellant,
v.
TOWN OF WELLESLEY, Janice Trainor-Tellier, Leonard Izzo, Mary
Suresh, James A. Goodhue and Albert S. Robinson, Defendants-Appellees.

No. 2010-P-0004.
April 28, 2010.

On Appeal from a Judgment of the Superior Court in and for the County of Suffolk

**Brief and Supplemental Appendix for the Defendants-Appellees, Town of Wellesley, Janice
Trainor-Tellier, Leonard Izzo, Mary Suresh, James A. Goodhue and Albert S. Robinson**

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*1 STATEMENT OF THE ISSUES

Did the Superior Court properly allow the Defendants' Motion for Judgment on the Pleadings where the administrative search of Plaintiff's property was carried out pursuant to a duly-issued Administrative Search Warrant authorized by the State's Public Health law and the State's Sanitary Code?

STATEMENT OF THE CASE***Nature of the Case***

The plaintiff, Catherine Barber, *pro se*, (“Ms. Barber”), a resident of the Town of Wellesley, appeals the Superior Court's decision which allowed the Town of Wellesley's and a number of Town Officials' Motion for Judgment on the Pleadings. Ms. Barber brought suit against the Town of Wellesley and certain Town Officials after they obtained and executed an Administrative Search Warrant of Ms. Barber's property. Ms. Barber claims that in procuring the Administrative Search Warrant and conducting the search itself, the Town violated certain of Ms. *2 Barber's constitutional rights. Plaintiff's Appendix, B1-13.¹

Prior Proceedings

On August 1, 2008, Ms. Barber filed this action against the Town of Wellesley, James A. Goodhue, Albert Robinson, Mary Suresh, Leonard Izzo and Janice Trainor-Tellier (collectively the “Town Officials”), ostensibly based upon the Town Officials' procurement of an Administrative Inspection Warrant from the Dedham District Court three years earlier and the subsequent inspection of Ms. Barber's home, which resulted in the Town's Health Department finding her home unfit for human habitation.² Service of process on the Town Officials was not completed and filed in the Superior Court until November 25, 2008. On December 1, *3 2008, Ms. Barber sought and obtained a stay of this action pending the results of her Applications for Criminal Complaints against the Town Officials. On January 8, 2 009, the Superior Court extended the stay requested by Ms. Barber for another 30 days.³ On February 19, 2 009, Ms. Barber filed an “Emergency Motion” to extend the stay another 30 days, which was denied. Accordingly, on February 24, 2009, all of the defendants Answered the Complaint. Ms. Barber then filed a Motion to Strike the Town Officials' Answer (which was denied on March 19, 2009) and a Motion to Default the Town Officials (which was denied on April 22, 2009). Upon motion to the Court, the Town Officials subsequently filed an Amended Answer on April 24, 2009. See Town Officials' Supplemental Appendix (“S.A.”), pp. 1-6.⁴

*4 On May 21, 2009, the Town Officials served their Motion for Judgment on the Pleadings consisting of the Motion itself, supporting Memorandum of Law, and the Affidavit of Board of Health Environmental Specialist, Leonard Izzo, together with the exhibits thereto.⁵ Ms. Barber, in turn, timely served her opposition to the Town Officials' Motion for Judgment on the Pleadings. The complete set of motion papers was filed on June 12, 2009. On July 30, 2009, the Superior Court heard argument on the Town Officials' Motion for Judgment on the Pleadings. On August 6, 2009, the Court (Sanders, J.) allowed the Town Officials' Motion.⁶ Among other things, the Court found that even “reading the Complaint generously, it simply fails to set forth facts which would entitle the plaintiff to recover under any legal theory.” Addendum, p. 3.

Approximately three weeks later, Ms. Barber filed a Motion for Reconsideration of the Court's ruling *5 allowing the Town Officials' Motion for Judgment on the Pleadings. The Motion for Reconsideration was denied on August 30, 2009. Taking a different tack, on September 22, 2009, Ms. Barber filed a Motion to Vacate the Judgment of Dismissal entered following the allowance of the Town Officials' Motion for Judgment on the Pleadings, which Motion was denied on September 25, 2009. Ms. Barber then filed a Motion for Reconsideration with respect to the Court's order denying her Motion to Vacate the Judgment of Dismissal entered in favor of the Town Officials on their Motion for Judgment on the Pleadings. On October 26, 2009, the Superior Court (Sanders, J.) denied Ms. Barber's Motion for Reconsideration. This appeal followed.⁷

***6 STATEMENT OF FACTS**

The Town of Wellesley is a municipal corporation organized under the laws of the Commonwealth of Massachusetts. At all relevant times, the individual Town Officials held the following positions: Janice Trainor-Tellier, former Director of the Health Department; Mary Suresh, current Director of the Health Department; Leonard Izzo, Environmental Health Specialist-Health Department; James Goodhue, Esq., private attorney; Albert Robinson, Esq., Town Counsel.⁸ Plaintiff's Appendix, B1-2. Ms. Barber owns a home located on 3 Solon Street, Wellesley, MA (the "property"). *Id.* Prior to the events which gave rise to this action, Ms. Barber ran an "antiques and collectibles" business out of her home. Plaintiff's Appendix, B4. Ms. Barber now lives in Avery Crossings Assisting Living, an assisted living community in Needham, MA. At the time the lawsuit was filed in 2008, Ms. Barber was 75 years old.

On July 18, 2005, Ms. Barber was admitted to the Newton-Wellesley Hospital for abdominal surgery. Plaintiff's Appendix, B5. Janice Trainor-Tellier and *7 Kim Hoff, Director of the Council on Aging, visited her at the Hospital. *Id.*, B5. Following her surgery at Newton-Wellesley Hospital, Ms. Barber was released to the North Hill Skilled Nursing Facility in Needham, where Ms. Barber claims she was assaulted, which resulted in her having to be readmitted to Newton-Wellesley Hospital. *Id.*⁹ On August 3, 2005, out of a concern for Ms. Barber's own well-being, Ms. Trainor-Tellier filed an **Elder Abuse** Person Report with the local Designated Protective Service Agency, Springwell. S.A., pp. 11-12. Through conversations between Ms. Barber and the Health Department, the Health Department had learned that Ms. Barber's home was without running water or a functioning toilet. *Id.* Ms. Barber was known to the Health Department and the Council on Aging due to her chronic hoarding.

On August 3, 2005, under the authority vested in the Health Department under Chapter 111, §§30 & 127A, and the State Sanitary Code, 105 C.M.R. §410.100(A), Ms. Trainor-Tellier filed an Affidavit in Support of an Administrative Search Warrant for the property. S.A., pp. 13-14. As stated in Ms. Trainor-Tellier's *8 Affidavit, "Ms. Barber has a long history with the Town of Wellesley as being a hoarder with multiple interventions by both the Health and Building Departments." *Id.* Of significance, Ms. Barber lives alone with no apparent support system of any kind. *Id.* That same day, August 3, 2005, an Administrative Search Warrant was issued out of the Dedham District Court. S.A., p. 15. A number of the Town Officials then conducted an inventory of the property and discovered that Ms. Barber's home "was teeming with clutter on every floor; the hallways, doors and windows were unpassable due to the amount of clutter; and there did not appear to be a functioning toilet." S.A., pp. 16-17. The Town's Fire Chief noted that the amount of material in Ms. Barber's home created "an extremely hazardous condition." S.A., p. 18.

As a result of this inspection, the Health Department found the property to be "unfit for human habitation" and issued an order condemning the property. S.A., pp. 16-17. Since Ms. Barber was not present, there was no need to physically remove her *9 from the property.¹⁰ The Department also padlocked the front and rear doors to prevent anyone from gaining entry to the house. Ms. Barber was promptly notified of the Condemnation Order and also advised that the keys to the padlocked doors would be maintained at the Wellesley Police Department, so she could retrieve personal items from her home pretty much at her convenience. *Id.* In fact, Ms. Barber has done so over the past four-plus years without incident. However, because Ms. Barber has not ameliorated the unsanitary conditions at the property, the Condemnation Order is still in effect.¹¹

Nearly three years after these events, on August 1, 2008, Ms. Barber filed this so-called "civil rights" action. Plaintiff's Appendix, A3. Although the Complaint is rather opaque, it appears to contain *10 separate counts under the Massachusetts Civil Rights Act (Count One);¹² a Section 1983 claim (Count Two); invasion of privacy (Count Three); intentional infliction of emotional distress (Count Four); trespass (Count Five); an unspecified claim under Rule 11 (Count Six); defamation (Count Seven); **elder**

abuse (Count Eight); and a claim titled “respondeat superior” (Count Nine).¹³ The Town Officials filed an Answer on February 24, 2009, and an Amended Answer on May 1, 2009. Plaintiff’s Appendix, A3.

On June 15, 2009, the Town Officials filed their Motion for Judgment on the Pleadings along with Ms. Barber’s opposition thereto. Id., A4-5. On July 30, *11 2009, the Superior Court (Sanders, J.) heard argument on the Town Officials’ Motion for Judgment on the Pleadings, which the Court allowed three weeks later. Recognizing that for purposes of such a motion, the Court must accept Ms. Barber’s well-pleaded allegations as true, the Court nonetheless determined that the Complaint “simply fails to set forth facts which would entitle plaintiff to recover under any legal theory.” Addendum, p. 3. On August 5, 2009, judgment was entered dismissing Ms. Barber’s Complaint in its entirety. Addendum, p. 4. On August 27, 2009, Ms. Barber filed a Motion for Reconsideration with respect to the decision dismissing the Complaint and she also sought to vacate that decision. On August 30, 2009, the Superior Court (Sanders, J.) denied Ms. Barber’s motion. Ms. Barber then filed a Motion to Vacate the judgment dismissing the Complaint which was denied on September 25, 2009, and a Motion for Reconsideration of that decision which was denied on October 26, 2009. On November 11, 2009, Ms. Barber filed her Notice of Appeal in the Superior Court. For the reasons discussed below, the Town Officials maintain that the Superior Court correctly dismissed *12 the Complaint and respectfully submit that the lower court’s decision should be affirmed.

ARGUMENT

I. The Superior Court Correctly Determined That Plaintiff Is Not Entitled To Relief Under Any Of The Legal Theories Contained In The Complaint.

A. The Superior Court Properly Dismissed Plaintiff’s Claim Under M.G.L. c. 12, §11H a/k/a the Massachusetts Civil Rights Act.

In pertinent part, the Massachusetts Civil Rights Act (“MCRA”) provides that it shall be unlawful for any person to interfere with another person’s “free exercise or enjoyment” of any right secured by the federal or state constitution through the use of “threats, intimidation or coercion.” M.G.L. c. 12, §11H. MCRA is similar to the cognate federal law, Title 42 Section 1983, except it does not require “state action.” Like Section 1983, MCRA incorporates common law privileges available to public officials. Of relevance here, the conduct of which Ms. Barber complains - namely obtaining and executing an Administrative Search Warrant for the property - was carried out pursuant to an administrative warrant duly issued by the Dedham District Court. Ms. Barber does not contend that the warrant was procured by “fraud” *13 or that any Town official made any misrepresentation to the Dedham District Court. Moreover, Ms. Barber was not home when the administrative search was carried out. It was only after the Health Department found the property “unfit for human habitation” that Ms. Barber was advised she could not return home until the property was remediated and made safe for human habitation. In the four years since, Ms. Barber has returned to the property on numerous occasions, without any interference from any Town official, to pick up her personal items. Simply put, the Complaint is devoid of any conduct constituting “threats, intimidation or coercion.” To the extent Ms. Barber contends that the administrative search itself somehow violates MCRA, she was not living at the property (or physically present), when the administrative search was carried out by the Health Department and, hence, was not the subject of any threats, intimidation or coercion while the administrative search was actually conducted.¹⁴

***14 B. The Town Officials’ Conduct Did Not Violate Title 42 U.S.C. Section 1983.**

In her Complaint, Ms. Barber alleges that she was injured “in her person and property as a result of [the defendants] conduct in violation of Section 1983.” Plaintiff’s Appendix, B15. Since Ms. Barber does not provide any further specificity, the Town Officials will assume that she is asserting claims under both the Fourth Amendment and the Due Process clause. Neither claim is availing.¹⁵ It is well-established that states have the authority under their police powers to enact laws protecting the health, safety and welfare of its citizens. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Management*, 550 U.S. 330, 342

(2007); *Commonwealth v. Henry's* *15 *Drywall Co.*, 366 Mass. 539, 541-542 (1974).¹⁶ To some extent, Section 6 of the Home Rule Amendment extends the police power to counties, cities, towns and villages. See Massachusetts Declaration of Rights, Art. 89, §6. An exercise of the government's police power is presumed to be constitutionally valid and is subject only to rational-basis review. See, e.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1979). Thus, in order to demonstrate that the Commonwealth's Public Health law or State Sanitary Code is not a valid exercise of police power, Ms. Barber must show that the means available under these laws are not reasonably necessary for the accomplishment of their purpose. *Goldblatt v. Town of Hempstead, N.Y.*, 360 U.S. 590, 594-95 (1962). If such a claim can be found in the Complaint, it fails as a matter of law because both the Supreme Court and the Supreme Judicial Court have upheld the constitutionality of a variety of *16 administrative searches. See, e.g., *Camara v. Municipal Court of the City of San Francisco*, 387 U.S. 523 (1967); *Commonwealth v. Tart*, 408 Mass. 249 (1990); *Commonwealth v. Haddad*, 364 Mass. 795 (1974); *Roketenetz v. Board of Assessors of Lynnfield*, 72 Mass.App.Ct. 907 (2008) (rescript); see also, *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 4 (1st Cir. 1982) ("The Supreme Court's decision in *Michigan v. Tyler* clearly indicates that for such inspections probable cause in the administrative sense is all that is necessary."); *Esmont v. City of New York*, 371 F.Supp.2d 202, 212-213 (E.D.N.Y. 2005) (no search warrant required for health inspectors to inspect homeowner's yard which was in plain view).^{17 18}

*17 Turning next to Ms. Barber's Due Process claim, given that she did not have. advance notice of the administrative search, the Town Officials assume Ms. Barber is advancing a procedural Due Process claim.¹⁹ *18 How much due process is necessary for a particular situation is not etched in stone. The Due Process clause is "flexible and calls for such procedural protections as the particular situation demands." *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted). In determining what procedural protections a particular situation demands, a court ordinarily weighs three factors: (1) the private interest that will be affected by the ex parte process; (2) the risk of erroneous deprivation through the ex parte process under attack and the probable value of additional or alternative safeguards; and (3) the interest of the party seeking the ex parte remedy with due regard for any ancillary interest the government may have in providing the ex parte process or foregoing the additional burdens of providing greater protections. See *Connecticut v. Doeher*, 501 U.S. 1, 10-11 (1991).

Applying that threefold test here, the Town Officials submit that they have not committed any procedural due process violation. With respect to the *19 first factor, the Town Officials acknowledge that Ms. Barber has a significant interest in living in her own home. Turning to the second factor, the Administrative Warrant was issued by a judicial officer; the Warrant issued based upon the submission of an affidavit from the Health Department Director, which was based on her personal knowledge of Ms. Barber's infirmities and the likely health hazard at the property; and, Ms. Barber had the right to request a hearing to remove the Condemnation Order, which must be held within thirty days or less after the Order is served. Finally, the Town Officials maintain the risk of harm in allowing a 75 year old woman, living alone, to return home (after recent surgery) to a property teeming with debris and no running water - found to be "unfit" for human habitation - outweighs whatever risk of immediate and irreparable harm Ms. Barber may have faced in not being allowed to return to her home. Like other health-related regulations, the statutory scheme here advances a policy of ensuring safe housing - "a policy which directly serves the government interest in health and welfare." *Jones v. Wildgen*, 320 F.Supp.2d 1116, 1128 (D. Kan. 2004) (upholding, inter alia, ordinance imposing occupancy limits on residential *20 rental property in areas zoned for single family use). Under the circumstances, the Town Officials submit that the Superior Court properly dismissed Ms. Barber's Due Process claim. See, e.g., *Mackey v. Montrym*, 443 U.S. 1 (1979) (upholding Mass. law which provides for the automatic suspension of driver's license, prior to a hearing, for refusing to take a breathalyzer exam); *Nollett v. Justices of Trial Courts of The Commonwealth of MA*, 83 F.Supp. 2d 204, 213-214 (D. Mass. 2000) (upholding, over due process challenge, constitutionality of ex parte domestic restraining orders issued under Chapter 209A).

C. The Town Officials' Conduct Did Not Violate Massachusetts' Privacy Statute.

Ms. Barber contends that the Town Officials violated her right to privacy under M.G.L. c. 214, §1B. While Ms. Barber does not state how the Town Officials did so, the Town Officials can only assume that Ms. Barber maintains that they did so when they entered her home in executing the above-referenced Administrative Search Warrant. The Town Officials need not tarry.

The administrative search of which Ms. Barber complains was authorized by a warrant issued by the Dedham District Court. Ms. Barber does not contend *21 that any of the Town Officials who participated in the search exceeded the bounds of the administrative warrant and/or that the Town Officials subsequently “publicized” any private facts about Ms. Barber that they discovered during the administrative search or any time thereafter. Whatever the scope of Ms. Barber's privacy rights under Chapter 214, §1B, those rights were not violated by a single administrative search which, in essence, was motivated by the Health Department's genuine concern that Ms. Barber's safety would be imperiled if she was left to her own devices.

D. The Superior Court Properly Dismissed All of Plaintiff's Common Law Claims.

Based on the rather amorphous allegations contained in the Complaint, the Superior Court properly dismissed all of Ms. Barber's common law claims.²⁰ Count Five (Intentional Infliction of Emotional Distress) was correctly dismissed because, *22 even assuming arguendo the truth of Ms. Barber's claims, the Town Officials' conduct was hardly “beyond all bounds of decency [nor] intolerable in a civilized community.” The Town Officials participated in an administrative search which resulted in their finding the property “unfit” for human habitation. When the administrative search was completed, they installed padlocks to prevent break-ins. Since that time (August, 2005), Ms. Barber has regularly returned to the property to retrieve her own personal items. Although Ms. Barber claims that several items including certain “antiques” cannot be accounted for, she does not contend that the Town Officials have taken her property or turned a blind eye toward such conduct by some third party (s). Needless to say, the Wellesley Police Department cannot station an officer in front of Ms. Barber's house around-the-clock. If Ms. Barber has lost certain items in the last several years, of course, that is unfortunate. Still, nothing any of the Town Officials have done is even remotely “beyond all bounds of decency in a civilized community.” See, e.g., *Dutil, petitioner*, 437 Mass. 9, 13 (2002).

***23 E. The Town Officials Are Entitled to Qualified Immunity.²¹**

For purposes of the Town Officials' entitlement to qualified immunity, the question is should they have known that the procedures for obtaining an administrative search warrant - as provided in Chapter 111 - “violated clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “On a motion for summary judgment, a court must determine whether a similarly situated reasonable public official could have believed that his or her actions were lawful in light of clearly established precedent.” *Harlow*, 457 U.S. at 818. “A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established” *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (emphasis added). The Town Officials are not aware of any Massachusetts cases which have held that G.L. c. III, §127A, is unconstitutional. On the contrary, as noted in Section *24 IB above, administrative searches conducted pursuant to a duly issued warrant have been routinely upheld by the Supreme Court and the Supreme Judicial Court. Accordingly, the Town Officials submit that even if Ms. Barber was permitted to pursue this action, they would still be entitled to qualified immunity on her constitutional and civil rights claims. See, e.g., *Plummer v. Town of Somerset*, 601 F. Supp. 2d 358, 364 (D. Mass. 2009) (“Qualified immunity attaches to discretionary conduct of government officials that ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (internal citation omitted) (emphasis added); *Matney v. City of North Adams*, 359 F.Supp.2d (D. Mass. 2005) (allegations including the arbitrary enforcement of health code violations, do not constitute valid due process claims and local officials would, in any event, be imbued with qualified immunity from suit).

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Superior Court allowing the Town Officials' Motion for Judgment on the Pleadings.

Footnotes

1 Since Ms. Barber's Complaint may be read as posing a constitutional challenge to the statutes relied on by the Town Officials in obtaining the challenged Administrative Search Warrant, the Town Officials have sent a copy of the parties' Appellate Briefs to the Office of the Attorney General. See [G.L. c. 231A, §8](#).

2 On August 24, 2005, the Town of Wellesley's Health Department issued an Emergency Order requiring that Ms. Barber vacate the premises until the property was brought into compliance with the State Sanitary Code. - (Ms. Barber is a chronic hoarder.) Ms. Barber has not lived there since the Emergency Order was issued. Ms. Barber now resides in Avery Crossings Assisted Living in Needham, MA.

3 Ms. Barber has made a number of requests to the Clerk Magistrate of the Dedham District Court which, to date, has refused to issue any criminal complaints against the Town Officials. On October 21, 2009, the Appeals Court dismissed Ms. Barber's appeal from the non-issuance of the sought-after criminal complaints. *Catherine Barber v. James Goodhue, et al.*, 2009-P-1922.

4 The Town Officials' Supplemental Appendix contains (i) the Amended Answer and (ii) their Motion for Judgment on the Pleadings and the Affidavit of Health Department Agent Leonard Izzo, together with the exhibits thereto.

5 Ms. Barber's statement in her Brief, p. 22, that the Motion for Judgment on the Pleadings was filed on behalf of the Town only -- and not the individual Town Officials -- is incorrect. The Motion for Judgment on the Pleadings was clearly styled as being on behalf of the Town of Wellesley *and* the individual Town Officials. S.A., p. 7.

6 A copy of the Memorandum of Decision and Order, and Judgment of Dismissal, is produced in the accompanying Addendum.

7 Although Ms. Barber maintains that she is appealing "all" of the lower court decisions against her, the Town Officials submit that the only final decision before the Appeals Court is the decision allowing the Town Officials' Motion for Judgment on the Pleadings. In any event, the Town Officials argument is confined to the propriety of that decision, i.e. the Memorandum and Order allowing the Town Officials' Motion for Judgment on the Pleadings and the Judgment entered pursuant to that decision - Docket Number Entry 29.

8 James Goodhue and Albert Robinson are both partners in the law firm of Grindle, Robinson, Goodhue & Frodin in Wellesley, MA.

9 Ms. Barber has filed a separate complaint for assault against Avery Crossings, NOCV2008-1450.

10 As was her prerogative, Ms. Barber never requested a hearing before the Board of Health to remove the Condemnation Order. [105 C.M.R. §410.831\(E\)](#). Generally, a hearing before the Board of Health must be commenced within thirty days of the date a condemnation order is issued and a decision rendered by the Board of Health not more than seven days after the hearings are concluded. [105 C.M.R. §§410.582-410.584](#). A person aggrieved by the final decision of the Board of Health may, in turn, seek relief in any court of competent jurisdiction. [105 C.M.R. §410.860](#).

11 Although they are now a year old, a number of pictures of the outside of the property were submitted to the Court below. S.A., pp. 19-21.

12 Count One also refers to Ms. Barber's rights under the 14th Amendment and Article 1 of the Massachusetts Declaration of Rights, along with [M.G.L. c. 265, §37](#). As no further specificity is provided, the Town Officials will address what they believe are Ms. Barber's "constitutional" claims in the next section, which discusses Ms. Barber's claim under [Title 42 U.S.C. §1983](#). The Town Officials omit any discussion of [M.G.L. c. 265, §37](#), which is essentially the criminal equivalent of the Mass. Civil Rights Act. Notably, Ms. Barber was never arrested or threatened with arrest.

13 Ms. Barber alleges that \$50,000 dollars of American and European paintings have been stolen from her home. Appendix, B10. There is no suggestion that any Town Officials were involved in the theft or loss of these paintings. The record does not state whether Ms. Barber had any insurance for these paintings and, if so, whether she recovered any of this loss from her homeowner's insurer.

14 The Town Officials hasten to add that it is exceedingly difficult to determine what "constitutional" right Ms. Barber claims was violated by the Town Officials' conduct. The Complaint makes only a fleeting reference to the Fourteenth Amendment. Plaintiff's Appendix, B14. In this regard, it should be noted that absent any constitutional or statutory violation, Ms. Barber cannot maintain a MCRA claim. *Perkins v. Commonwealth*, 52 Mass.App.Ct. 175, 181-182 (2001).

15 The Town Officials do not believe Ms. Barber is asserting any violation of her privacy rights under the United States Constitution. Suffice to say, however, because the Constitution creates no "free-floating" right to privacy, a successful privacy claim must be anchored in an enumerated constitutional guarantee. *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 182 (1st Cir. 1997). The Town, Officials discern no such claim here.

16 The Commonwealth's police power is derived, at least in part, from the [Massachusetts Constitution, Pt. 1, Art. 1](#). See, e.g., *Loring v. Comm. of Public Works of City of Boston*, 264 Mass. 460, 464 (1928) ("Provision for an ample supply of water for the use of those who dwell or do business in crowded centers of population is manifestly a public utility of first importance. It has a direct and intimate relation to the public health and public safety and to the public welfare in its most restricted sense.")

17 The Town Officials note that the Legislature has frequently exercised its police power by expressly authorizing entry upon private land *without* a warrant of any kind. See [M.G.L. c. 94, §§35, 60](#) (to inspect milk and milk products); [G.L. c. Ill, §9](#) (to inspect food and drugs); [G.L. c. 148, §5](#) (to inspect fire hazards); [G.L. c. 129, §7](#) (to inspect animals); [G.L. c. 159, §27](#) (to inspect premises of

a common carrier); G.L. c. 130, §7 (to inspect shellfish); G.L. c. 140, §38 (to inspect lodging houses). Here, of course, the Health Department obtained an administrative warrant before they entered Ms. Barber's property.

18 The Town Officials are aware that the Supreme Judicial Court has stated that “[a]n administrative search must also be ‘reasonable’ in the sense that it “must be as limited in its intrusiveness as is consistent with the satisfaction of the administrative need that justifies it.” *Commonwealth v. Carkhuff*, 441 Mass. 122, 127 (2004) (internal citations omitted). Ms. Barber's Complaint does not allege the Town Officials inspection of her home was overintrusive; however, even if such an allegation can be gleaned from the Complaint, the Town Officials submit that the “administrative need” here - the habitability and safety of Ms. Barber's home - warranted an inspection of the entire property. Similarly, Ms. Barber does not contend that the Town Officials administrative search of the property was “subterfuge” to gather evidence for a criminal investigation. Indeed, the only actions taken involving any criminal proceedings, have been Ms. Barber's several attempts to secure criminal complaints against the Town Officials.

19 The Town Officials note that the due process protections of the Massachusetts Constitution are comparable to those of the federal constitution. *Doe v. Attorney General*, 426 Mass. 136, 144 n.8 (1997)(“we treat the procedural due process protections of the Massachusetts and United States Constitutions identically.”). In this regard, the Town Officials do not believe Ms. Barber is pursuing a substantive Due Process claim. If this is incorrect, they are not aware of any cases which suggest that one has a fundamental right to own private property free from any- governmental oversight or regulation of that property. On the contrary, the Supreme Judicial Court has observed that private property may be subordinated to reasonable regulations that are critical to the general public's health and safety. *See, e.g., Fragopolous v. Rent Control Bd. of Cambridge*, 408 Mass. 302, 307 (1990); *Thurlow v. Crossman*, 336 Mass. 248, 250 (1957); *Mulger v. Kansas*, 123 U.S. 623, 665 (1887) (consistent with the Fourteenth Amendment, “. . . all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.”). Likewise, the “right” to engage in one's chosen profession is also subject to the State's police power to oversee or regulate that field. *See, e.g., Tober Foreign Motors, Inc. v. Reiter Oldsmobile*, 376 Mass. 313 (1978).

20 Certain of Ms. Barber's common law claims are addressed summarily. As the Town Officials argued below, Count Six (Professional Responsibility) fails to state a claim under Rule 12(b)(6). Count Seven (Defamation) was properly dismissed because the Complaint does not identify the alleged defamatory statement, who made it, or when it was made. Count Eight (Assault & Battery) is directed at the nursing home where Ms. Barber used to live, and not against the Town Officials. Count Nine (Respondeat Superior) does not state a separate legal claim.

21 The lower court did not address this particular argument in its Memorandum and Decision allowing the Town Officials' Motion for Judgment on the Pleadings.